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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 233

DIXIE CARRIERS, INC., COYLE LINES INCORPORATED, AMERICAN BARGE LINE COMPANY, FEDERAL BARGE LINES, INC., *Appellants*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL., *Appellees*

Appeal from the United States District Court for the Southern District of Texas, Houston Division

REPLY OF APPELLANTS TO MOTIONS TO AFFIRM

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STATEMENT

Appellees have filed two motions to affirm, one by the Interstate Commerce Commission and the other by the railroads which were the defendants in the Commission proceeding. The United States, the statutory defendant, did not file a motion to affirm and did not support in the lower court the construction of section 3(4) of which appellants complain.

The two motions are quite similar as to reasons advanced for affirmance. However, except for an attempt

to distinguish *Interstate Commerce Commission* v. *Mechling*, 330 U.S. 567, the propositions relied upon bear no relation to the reasons given by the Commission for its construction of the statute.

ARGUMENT

I

Except for general language expressing agreement with the conclusions of the Commission, appellees can show nothing in the opinion of the lower court which rules upon the principal question involved: Is a division of a joint all-rail rate charged on traffic received from a railroad connection a "rate" or a "charge" within the meaning of section 3(4) of the Interstate Commerce Act so as to constitute proof of discrimination when a higher local rate is assessed for the same service on the same traffic received from a barge line connection?

Appellees seek to excuse the failure of the lower court to rule directly on that question on two grounds: (1) That the question was not "specifically" raised in the complaint before the Commission, and (2) that the question was "waived" at the oral argument.

Paragraph V of appellants' complaint before the Commission specifically alleged a violation of section 3(4) by reason of the rates and charges maintained by the appellee railroads. That is sufficient to raise the issue which required the Commission to rule on the question of whether a division is a rate or charge within the meaning of section 3(4). It was not necessary to plead the evidence as to that matter, nor would it have been proper to plead the affirmative of the question under discussion, such being a pure conclusion of law.

That the question of statutory construction involved in this appeal was properly before the Commission is implicit in its report on reconsideration since, if it were not, the ruling of which appellants complain would not have been made. This circumstance also answers appellees' claim that the issue or question was "waived". The statement of counsel for appellants at oral argument which is asserted as constituting the waiver, related only to the matter of remedy and not to the issue of the existence of discrimination between connecting carriers.

II

Appellees seek to avoid the impact of this Court's decision in the *Mechling* case by alleging that that case did not involve section 3(4) discrimination predicated on a difference between an all-rail division and a separately-established rate on barge traffic. Their position is untenable because: (1) The broad condemnation of inter-carrier discrimination found in the *Mechling* case is directed, as is the statute, against the substance, not the form, of discrimination. (2) While the Court in the *Mechling* case made no reference to all-rail divisions by name, the most important factual occasion of the discrimination complained of, there pertained to the exact comparison here made, i.e., between a division east of Chicago of an all-rail joint rate from Illinois origins and a separately-established rate assessed upon ex-barge traffic from the same origins.

This Court in the *Mechling* case held unlawful the Commission's assumption, in the decision there reviewed, that section 3(4) had no application to "discrimination if accomplished by through rates". Such assumption was pronounced "basic error" because it "would permit the destruction or curtailment of . . .

barge transportation wherever the transported goods were carried beyond the end of the barge line". Appellees now assert that section 3(4) has no application to discrimination accomplished by through rates where the difference in treatment is between a division and a separately established rate. Although it is apparent that discrimination so achieved would permit destruction or curtailment of barge service in the same manner and degree as if accomplished by preferential proportional rates, the *Mechling* case is said to be restricted only to discriminations assuming the latter form.

This Court could not have intended so ineffectual a result. If its holding were so restricted, it would not have reached what was factually the *most important* instance of discrimination in the rate adjustment before it—the movement of grain from origins in Illinois. The all-rail movement of grain from such origins, was described by the Commission as "the principal traffic here considered", and as being handled by railroads operating from Chicago to the East under "divisions" of "through one-factor rates". See *Grain Proportionals, Ex-barge to Official Territory*, 262 I.C.C. 7 (1945) at pages 13 and 30. This Court found it unnecessary to make specific reference to this distinction in method, while nonetheless condemning the substance of the discrimination.

III

Appellees cite and quote from several cases which stand for the proposition that a division is not a proper measure of the lawfulness of a local rate in a shipper-carrier relationship. In the framework of this case, those decisions simply mean that a shipper of traffic originating at East St. Louis could not establish the

unlawfulness of his local rate from East St. Louis to Danville by comparison with the East St. Louis-Danville division of a joint through rate from a point such as Galveston. Similarly, in the context of the *Mechling* case, the cited decisions would prevent a shipper of grain originating at Chicago from complaining of the lower division or proportional rate exacted by the railroads operating eastward from Chicago on grain originating beyond Chicago at a place such as Morris, Illinois. Appellants do not quarrel with the soundness of this rule. It has, however, no application in the premises.

A division is not a charge to the shipper because it is not demanded from him; he pays the through rate as a whole. No interest of his is affected by the manner of apportionment between carriers of that through rate.

As between carriers, however, a division is the charge demanded from a connecting line and can be a means of discrimination whenever a higher division or a higher separately established rate is demanded on traffic of another connecting line. Where a railroad practices discrimination among its connections by variable divisions unduly preferring certain lines, it violates the express provisions of section 1(4) of the Act.* Where the preferentially varying charges demanded from connections are expressed as to each in the form of separately published rates, section 3(4) is violated under any view of the *Mechling* case. But where, as here, the preferential variance is between a division and a higher separately-established rate, appellees would have the

* That section provides in part: "It shall be the duty of every common carrier subject to this part . . . in case of joint rates . . . to establish . . . divisions . . . which shall not unduly prefer or prejudice any of such participating carriers."

Court believe that there is no law to prohibit such discrimination. They rely wholly on a principle of law pertaining to a carrier's relations with its shippers, as if it pertained equally to a carrier's relations with connecting carriers. That principle, entirely sound in its proper application, may not, however, be relied upon to exempt from section 3(4) discrimination between carriers brought about by a division. Prior to the enactment of section 1(4) in its present form, and when the only prohibition against discrimination in rates and charges between connecting carriers was in the provision which now is section 3(4), the Commission so recognized in *Western Pacific R. Co.* v. *Southern Pacific Co.*, 55 I.C.C. 71, 81, when it said (Italics supplied):

> We have said many times that ordinarily the passenger or shipper is not interested in the division of joint rates between carriers. * * * It cannot, however, be said that the carrier having the strategical advantage may lawfully accept from one of its connections a division which permits that competitor to share on fair and compensatory terms in the competitive traffic and at the same time demand from another connection for the same service in movement of the same competitive traffic a division so high as to make it impossible for it to share therein on a compensatory basis. In other words, if the carrier having the strategical advantage were to admit one competitor to share in the traffic and exclude another *by refusing to enter into any arrangement with it*, or effected the same exclusion by exacting divisional arrangements which would prohibit participation by that connection in the traffic, *the discrimination would be unlawful.*

The Commission in that case held as to statutory prohibition of discrimination in charges between connecting carriers (p. 73):

The expression of rates and charges in the form of divisions makes them nonetheless rates and charges which may be discriminatory.

IV

Appellants cited the Commission's decision in *Denver & R.G.W.R. Co.* v. *Union Pacific R. Co.*, 287 I.C.C. 611, 660 (the so-called *Ogden Gateway* case), in support of an affirmative resolution of the second question presented by this appeal, i.e., that participation with one and not another connection in joint rate arrangements on traffic moving between the same origins and destinations constitutes unlawful discrimination in rates and charges under section 3(4). That decision, so far as here relied upon, was upheld by the District Court for the district of Nebraska, Omaha Division, in opinion filed October 22, 1954. Appellees assert that this case is distinguishable. Insofar as appellants rely upon that decision, however, it presented and decided the precise issue here in question.

While the Commission in the *Ogden Gateway* case was concerned as to many of the routes involved, with questions of the existence of or public interest in through routes under sections 15(3) and (4), the particular situation where section 3(4) was relied upon in prescribing through routes to eliminate discrimination, presented a distinct issue which was separately considered and decided. In that instance, the Union Pacific interchanged traffic under joint rates with one of its rail connections (the Bamberger line) and refused such arrangements with the D. & R. G. on traffic between the same specified points via the same junction. As to this situation the Commission had found that there existed no through routes between the Union Pa-

cific and the D. & R. G. and that there was no foundation for prescribing such routes under section 15. In view of the discrimination, however, the Commission prescribed joint through routes and rates in a separate and distinct paragraph dealing with that one situation, resting its decision solely upon section 3(4). The Nebraska Court similarly treated the section 3(4) issue in a separate paragraph and upheld the Commission's determination.

Appellees assert that the *Ogden Gateway* case did not involve any issue as to whether a division is a rate or charge under section 3(4). That assertion apparently rests upon the fact that the Commission there chose to predicate its decision upon the affirmative of the second question here presented for decision; "whether Section 3(4) makes unlawful the action of a carrier by railroad in participating with one connecting carrier in through routes and joint rates, while refusing similar participation to another connecting carrier seeking to engage in the same through transportation, where the said rail carrier performs the same service in each instance." There is no probative distinction between the facts before the Commission in that case and those here presented. In both cases, the offending carrier insisted upon its local rate on traffic interchanged with one of its connections while accepting a lower division on traffic interchanged with a preferred connection to and from the same points.

This serves only to demonstrate forcefully that the two questions are not necessarily dependent on one another and that a correct resolution of either would compel the removal of the discrimination of which appellants complain. The point was specifically and succinctly made by Commissioner Eastman in his con-

curring opinion in the *Western Pacific* case (supra). After first indicating his agreement with the majority that a decision was a "rate", "fare", or "charge" within the meaning of section 3(4), he then went on to state (page 84):

> * * * However, this is beside the point, for if a carrier refuses without just cause to make a joint fare with one connecting carrier upon as favorable a basis as with another, which is in substance the allegation in this complaint, it is, I believe, discriminating in its joint "rates and charges," contrary to the provisions of the paragraph in question.

See also *Ann Arbor R.R. Co.* v. *B. & O. R.R. Co.*, 136 I.C.C. 578 (Div. 3, 1927).

V

Appellees assert a lack of evidence "pro or con" as to the similarity of services rendered upon ex-rail versus ex-barge traffic. A passage from the *Ogden Gateway* case is quoted to the effect that transportation conditions must be shown to be similar to support a finding under section 3(4). The quoted passage pertains to an alleged discrimination by reason of the offending railroad joining with certain of its connections in through routes and joint rates via one junction while refusing to join the complaining railroad in such routes and rates via a *different* junction. In the instant case, however, the East St. Louis-Danville railroads join their preferred railroad connections in through routes and joint rates while refusing to join with appellants on any basis lower than their local rate via the *same* junction.

In any event, appellees are in error in their assertion that the record is bare on the point. Traffic brought to East St. Louis by either rail line or water line connections would be transported on to Danville by the appellee carriers in precisely the same manner and with the same physical facilities. The only distinction is that in the case of the barge connection, instead of a simple switching operation to move the cars from one railroad to another, the traffic must be transferred from barge to cars and the cars then switched from the terminal to the connecting rail line. Appellants testified that the present barge rate from Galveston to East St. Louis includes all accessorial services at the latter point, including such transfer and switching, which would place the loaded cars on the tracks of appellee rail lines in exactly the same fashion as cars received from connecting rail lines. Appellee rail lines expressed some disagreement with appellant's statement of the tariff provisions, as the tariffs in question mentioned specifically only the matter of switching, and did not spell out the situation with respect to the intermediate step of transfer. In order, however, that there be no doubt about the identical service to be performed by the appellee rail lines in either event, appellants made it clear beyond question that they stood willing to absorb all costs necessarily incident to placing the loaded cars on the tracks of the appellee rail carriers (Transcript, page 23), and that fact was noted in the decision of Division 3 of the Commission (*American Barge Line Co. et al.* v. *Chicago and E. I. R. Co., et al.*, 287 I.C.C. 403, 405) where it said, "From the joint barge rate of $5.32 the barge lines do absorb the cost of switching the loaded cars from the barge terminal at East St. Louis. * * * The tariff is silent concerning absorption of the

unloading charges; however, the barge lines are willing to absorb those charges."

Thus the record contains ample evidence that the services to be performed by appellee rail lines are the same in each case.

VI

Appellees suggest that the Commission could not grant the relief from discrimination requested in the absence of proof of public interest under section 15(3). This contention has been expressly rejected by this Court in *Chicago, I. & L. R. Co.* v. *United States*, 270 U.S. 287 (1926). In that case this Court had under review a Commission determination under section 3(3) [now section 3(4)] of the Act that refusal of steam railroads to interchange traffic with electric lines on a reciprocal switching basis, while contemporaneously maintaining such arrangements with other preferred steam lines, was an unlawful discrimination. Complainant in that case (*Chicago, Lake Shore & S. B. Ry. Co.* v. *L. E. & W. R. R. Co.*, 88 I.C.C. 525 (1924)) had conceded that there was no public interest in the relief requested, i.e., "that the steam roads were serving their industries adequately at the time of hearing and that the electric line wished to divide the business". This Court stated the grounds upon which the railroads sought reversal of the Commission's order as follows at page 292:

> The steam railroads contend that, in effect, the order [entered under section 3(3), now 3(4)] directs them to establish through routes and joint rates, or to allow a common use of terminals; that such extensions of service can be legally made only upon a finding that public convenience and necessity require them . . . and that, without making such

> a finding, the Commission has, under the guise of a discrimination order, compelled them to extend their service. * * *

The Supreme Court answered this contention in simple direct language as follows at pages 292 and 293:

> The order does not require the steam railroads to extend any service to the South Shore. It leaves them free to remove the discrimination by any appropriate action. * * * Whenever discrimination is, in fact, practiced, an order to remove it may issue.

VII

Appellees suggest that this appeal contains no "substantial" question. The fundamental matter at stake is the survival of a Congressional prohibition of discrimination as a meaningful enactment. If the construction which the Commission has in this case placed upon the scope of section 3(4) is allowed to prevail, there can be no effective obstacle in the path of railroads who may find it to their interest to freeze out water carriers from participation in traffic moving beyond barge ports of discharge. Under any guise, discriminatory charges for transportation beyond such ports constitute an effective deterrent to the use of barge service. The effect of a discrimination is gauged by its severity, not its name.

CONCLUSION

It is respectfully submitted that the Motions to Affirm are without merit and should not be granted.

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Proof of Service

In compliance with the applicable provisions of the Revised Rules of the Supreme Court of the United States, I, Donald Macleay, one of the attorneys for the several appellants on whose behalf the foregoing Reply of Appellants to Motions to Affirm is submitted, and a Member of the Bar of the Supreme Court of the United States, hereby certify that I have served copies of the foregoing document on counsel for the several parties to this proceeding, as follows:

1. On the United States of America by mailing copies in duly addressed envelopes with first class postage prepaid to:

Honorable Simon E. Sobeloff
Solicitor General of the United States
Department of Justice
Washington 25, D. C.

Honorable Stanley N. Barnes
Assistant Attorney General
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and with air-mail postage prepaid to:

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2. On the Interstate Commerce Commission by mailing copies in duly addressed envelopes with first-class postage prepaid to

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3. On the New York Central Railroad Company, Chicago & Eastern Illinois Railroad Company, Illinois Terminal Railroad Company, and Wabash Railroad Company, by mailing copies in duly addressed envelopes with air-mail postage prepaid to

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This the 31st day of August, 1955.

DONALD MACLEAY